Supreme Court, U. S.
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No. 77-771

In the
Supreme Court of the United States
October Term, 1977

DAVID L. SCHURGIN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

REPLY OF THE PETITIONER TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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Pursuant to rule 24 of the Rules of Practice of the Supreme Court of the United States, petitioner David L. Schurgin submits this brief in reply to the brief in opposition of the Solicitor General.

In his brief in opposition the Solicitor General misstates both the argument of the petitioner and the specific content of his petition. In its brief in opposition the government states that, "[P]etitioner [Schurgin] points to no specific incident of confusion," (Brief in Opposition, p. 5) an obviously erroneous statement in view of the fact that petitioner in the first full paragraph on page nine states, "Thus, the opinion of the court of appeals perpetuates the confusion of the district court, confusion

which culminated in the judgment of the district court, for on June 11, 1976, that court found the petitioner, who had been tried only on one count, guilty on two counts, a finding possible only if the court considered testimony not properly admitted into evidence in petitioner's trial." More importantly, however, the Solicitor General fails to address petitioner's argument concerning confusion at trial. Following the opinion of the court of appeals, the Solicitor General states: "[S]everal times during the course of the proceedings the trial judge incorrectly identified the defense attorneys, referred to their clients by the wrong name, or showed some momentary confusion about which jury was sitting in which case. As the court of appeals observed, however, most of these incidents took place outside the presence of the juries"; "[I]t [the confusion] was not caused or enhanced by the use of multiple juries"; and "Furthermore, when misstatements did occur, the court promptly corrected itself or the attorney involved and instructed the jury according." Brief in Opposition, p. 5. These observations address a particular inquiry, that is, does review of the circumstances require as its logical conclusion, a finding that the proceeding must necessarily have resulted in confusion on the part of the juries. These observations are inapposite to the inquiry in the present case, that is, whether the joint prosecution of four separate trials, two before juries and two before the bench resulted in such overwhelming confusion on the part of the district court, the trier of fact in petitioner's case, that the proceeding ended by denying petitioner due process of law.

In the present case, the general question of confusion at trial subsumes two more particular propositions: first, whether review of the record reveals such pervasive and

continuing confusion as to require the reviewing court to conclude that the proceedings resulted in confusion on the part of the juries and second, whether the actual evidence in the record of confusion on the part of the district court coupled with the fact that the court heard not two but four trials simultaneously, compels the conclusion that the proceeding resulted in confusion on the part of the court itself. Following the decision of the court of appeals, the Solicitor General responds not to the second proposition, the relevant issue in petitioner's case, but to the first proposition. Thus, although purporting to respond, the Solicitor General in fact fails to address the issue in question, that is, whether the overwhelming confusion which resulted from the attempt to conduct the four separate trials of the petitioner and his three co-defendants simultaneously resulted in such overwhelming confusion on the part of the district court, the trier of fact in petitioner's case, as to make the fair and impartial trial of the charge against petitioner impossible, thereby depriving him of due process of law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, RALPH E. BROWN, a member of the bar of the Supreme Court of the United States, and counsel for the petitioner, hereby certify that I have this February 24, 1978, served three copies of the foregoing Reply of the Petitioner upon the Solicitor General of the United States, Department of Justice, Room 5614, Washington, D.C. 20530, and upon James K. Robinson, United States Attorney, United States Courthouse, Detroit, Michigan 48226, by depositing same, first class postage prepaid, in the United States mail box at 104 South Michigan Avenue, Chicago, Illinois. All parties required to be served have been served.

/s/ Ralph E. Brown